

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

Original Affidavit of Mailing

77-

10 be argued by
RONALD G. RUSSO

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-8124

Bp/s

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
—against—

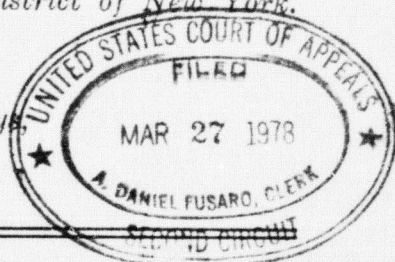
PATSY JOHN RAUCCI and PETER
FRANK GIATTINO,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

HARVEY M. STONE,
RONALD G. RUSSO,
Assistant United States Attorneys,
(Of Counsel).



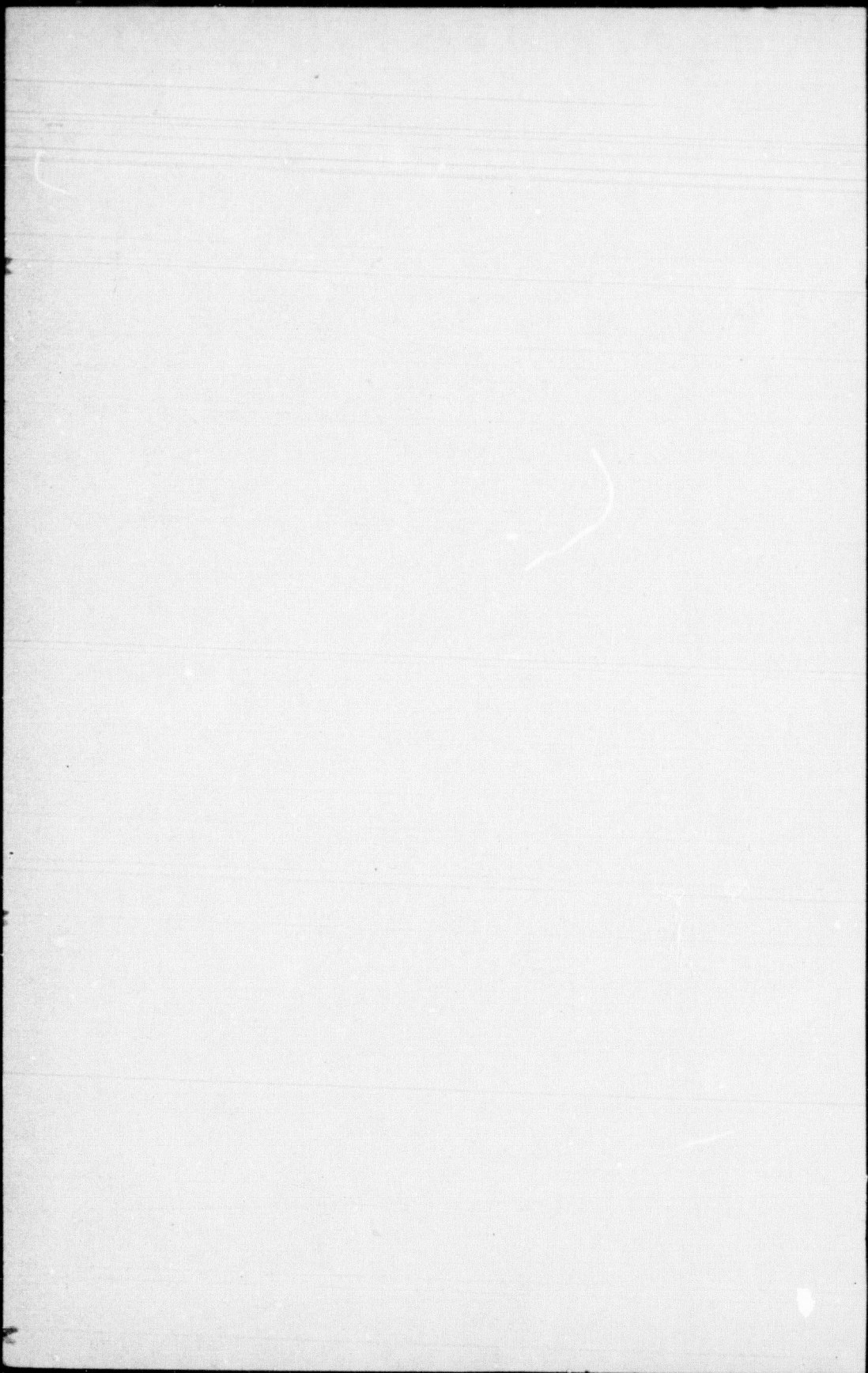


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	3
ARGUMENT:	
POINT I—Appellants Were Not Misled by the Gov- ernment and Suffered No Prejudice As a Con- sequence of the Government's Actions	11
POINT II—Under The Totality Of The Circumstances It was Proper To Admit Carol Fein's Identifica- tion Testimony	15
A. The Photo-Spread	15
1. The Photo-Spread was not Suggestive..	16
2. Agent Jensen was not Required to use a Photo-spread in the First Instance ..	17
3. Under the Totality of the Circumstances there did not Exist a "Very Substantial Likelihood of Irreparable Misidentifica- tion"	18
(a) The opportunity to view	19
(b) The degree of attention	20
(c) The witness' level of certainty ...	20
B. The "Show-Up"	21
POINT III—The Government did not deny Appellants access to exculpatory material	22
POINT IV—The testimony which appellants claim warrants a new trial fails to satisfy the require- ments of newly discovered evidence	24
CONCLUSION	28

TABLE OF AUTHORITIES

Cases:

<i>Anderson v. United States</i> , 369 F.2d 11 (8th Cir. 1966)	25
<i>Brady v. State of Maryland</i> , 373 U.S. 83 (1963) ...	23
<i>Brandon v. United States</i> , 190 F.2d 175 (9th Cir. 1951)	25
<i>Brathwaite v. Manson</i> , 527 F.2d 363 (2d Cir. 1975)	19
<i>Connelly v. United States</i> , 371 F.2d 333 (8th Cir. 1959)	25
<i>Johnson v. United States</i> , 32 F.2d 127 (8th Cir. 1929)	25, 26
<i>Manson v. Brathwaite</i> , 432 U.S. 98 (1977)	19, 20, 22, 27
<i>Moore v. Illinois</i> , 408 U.S. 786 (1972)	14
<i>Neil v. Biggers</i> , 409 U.S. 188 (1972)	19
<i>United States v. Agurs</i> , 427 U.S. 97 (1976)	23, 24
<i>United States v. DiStephano</i> , 555 F.2d 1094 (2d Cir. 1977)	22
<i>United States v. Gentile</i> , 530 F.2d 461 (2d Cir.), cert. denied, 426 U.S. 936 (1976)	22
<i>United States v. Miller</i> , 411 F.2d 825 (2d Cir. 1969)	14
<i>United States v. On Lee</i> , 201 F.2d 722 (2d Cir. 1953)	25, 26

Statutes:

26 U.S.C. § 5861(d)	1
26 U.S.C. § 5871	1
Rule 16, Federal Rules of Criminal Procedure	13

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-8124

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
—against—

PATSY JOHN RAUCCI and PETER
FRANK GIATTINO,
Defendants-Appellants.

BRIEF FOR PLAINTIFF-APPELLEE

Preliminary Statement

Patsy John Raucci and Peter Giattino appeal from a judgment of the United States District Court for the Eastern District of New York (Pratt, J.) entered on May 6, 1977, convicting them, after a jury trial, of unlawfully possessing destructive devices, to wit, two molotov cocktails, which were not then registered to them in the National Firearms Registration and Transfer Record, in violation of Title 26, United States Code, Sections 5861(d) and 5871. After the jury had been discharged, the court requested counsel to set forth in writing defendants' objections to the admission of the testimony of Ms. Carol Fein, a government rebuttal witness whose testimony was the subject of objection both before and after she took the stand. On May 27, 1977 appellants formally moved the district court to set aside the verdict and grant either a judgment of acquittal or, in the alternative, a

new trial on the ground that the government had misled defendants in not informing them of Ms. Fein's potential testimony and on the further ground that it was error to admit her testimony as it was improperly tainted by the government's suggestive identification procedures. Following a full hearing on these issues on July 21, 1977, the district court denied the application in a lengthy Memorandum and Order dated August 11, 1977 (A. 81-117).¹

Thereafter counsel corresponded with the court on August 19, 1977 with respect to one point of the court's August 11 decision and requested the opportunity to introduce certain additional testimony (A. 119). Treating that letter as a motion for reconsideration the court denied the application on August 24, 1977 (A. 120). On September 1, 1977 Raucci was sentenced to a term of 6 years imprisonment and Giattino to a term of 5 years imprisonment.

On September 9, 1977 defendants moved pursuant to Rule 33 of the Federal Rules of Criminal Procedure for a new trial on the grounds of "newly discovered evidence" and in the interest of justice. In the alternative defendants requested the taking of additional testimony as part of the July 21, 1977 hearing. After receiving extensive briefs from both parties the court denied that application on November 4, 1977.

On appeal appellants raise the very issues which were raised below and which were the subject of extensive hearings, affidavits and legal memoranda. Appellants here claim *first*, that they were misled and unduly prej-

¹ For purposes of clarity the government has adopted the same designations used in appellants' brief (i.e., "A" refers to Appellants' Appendix, "H" refers to the minutes of the hearing conducted on July 21, 1977 and "R" refers to the trial record). In addition, references to Appellants' Brief are designated "Br."

udiced by the government's failure to reveal the testimony of a potential rebuttal witness; *second*, that it was error to permit that witness to identify Raucci as there was a substantial likelihood of irreparable misidentification; *third*, that the prosecutor's "feeling" that the rebuttal witness was uncertain of one photo of Raucci was "exculpatory material", the non-disclosure of which requires a new trial; and *fourth*, that the court committed error in denying appellants' application for a new trial due to the discovery of new evidence. Each claim on this appeal relates to the rebuttal testimony of Carol Fein.

Statement of Facts

1. Police Officer Arthur B. Reiersen of the Suffolk County Police Department testified that in the early morning hours of August 8, 1976, while he was on duty and travelling in an easterly direction on the Sunrise Highway (the "Sunrise"), he observed a flash of light. He was then approximately three-tenths of a mile from the Doll House, a "topless" bar on the southerly side of the Sunrise in Oakdale, New York (Tr. 124, 239). Reiersen accelerated, arrived at the Doll House, observed that there was a fire on the side of the building and saw, at the same time, "a car crossing the parking lot, reasonably fast" (Tr. 240). He then saw the vehicle exit the parking lot by making a right-hand turn and travelling in an easterly direction on the Sunrise. Reiersen further noticed that as the vehicle left the parking lot it swayed on its springs as though it had taken the turn too fast (Tr. 243). Reiersen radioed his dispatcher that there was a fire and that he had observed a car leaving the parking lot at a high rate of speed. He then turned on his overhead lights and siren and accelerated to maximum speed in pursuit of the vehicle (Tr. 244-246).

Reiersen testified further that he observed the vehicle from the time it left the parking lot until it was finally stopped (Tr. 242). When it became apparent that the vehicle was not obeying his direction to pull over, Reiersen notified his dispatcher of the pursuit (Tr. 245, 247). Officer Reiersen continued his pursuit of the vehicle and, when it went through a red light at the Smithtown Avenue intersection, he continued the chase (Tr. 248). As the Officer and the vehicle continued in an easterly direction, Reiersen noticed that a patrol car, then on Lakeland Avenue at the Sunrise, was moving slowly across the eastbound lanes of the Sunrise in a northbound direction. As the vehicle Reiersen was pursuing approached Lakeland Avenue, which runs across the Sunrise in a north-south direction, he noticed that it slowed down and, when the second police vehicle had blocked both eastbound lanes of the Sunrise, the pursued vehicle negotiated a left-hand turn and then began travelling in a northbound direction on Lakeland Avenue (Tr. 250). The vehicle finally pulled over to the side of the road when it was approximately 500 feet north of the Sunrise and both individuals in the vehicle were placed under arrest (Tr. 252, 538). Reiersen identified the driver of the vehicle as appellant Giattino and the passenger as appellant Raucci. Reiersen further testified that in all he had chased defendants' vehicle about a mile and three-quarters and at speeds in excess of 90 miles per hour (Tr. 292). During routine police questioning by Reiersen, appellant Giattino stated, in response to a question as to whether he had all his fingers and toes, that "I have everything except my head—but I left my head home" (Tr. 283).

Police Officer Edward G. Colligan testified that on August 8, 1976 at approximately 5:45 a.m., while on duty in the vicinity of the Doll House, he received a radio transmission that an arson had been committed at the Doll House and that the pursuit of a vehicle from the parking lot was underway (Tr. 500). Colligan proceeded

in a northerly direction on Lakeland Avenue until he reached the Sunrise, looked to his left and observed two vehicles heading in his direction (Tr. 502-503). He observed the two vehicles "coming very fast, very fast towards me", and moved out to block the eastbound lane of the Sunrise (Tr. 503-504). Suddenly the lead car braked; Colligan saw the front end of the vehicle dip slightly more than normally in applying its brakes and then observed the vehicle go into a "power slide", turn 90 degrees and head north without losing much acceleration (Tr. 505). Colligan also observed the driver "frantically turning the wheel as he was making the turn" (Tr. 505). Colligan joined the pursuit in a northbound direction, and the vehicle pulled over about 500 feet north of the intersection where it made the left turn (Tr. 538). At that point, Colligan testified, the driver and the passenger of the vehicle, whom he identified as Giattino and Raucci respectively, were arrested (Tr. 507-508).

In addition to the above testimony, other officers testified that they had heard Officer Reiersen's radio transmission that he was in pursuit of a vehicle at a high rate of speed and was trying to "pull it over" (Tr. 441, 451, 496).

Following the arrest of defendants, Officers Reiersen and Colligan returned with the defendants to the scene of the arson. Present at the Doll House by that time were several police units and a fire truck (Tr. 260). Officer Reiersen testified that at that time two bottles—the molotov cocktails—were discovered on the roof of the Doll House. One bottle had broken and the rag which had been inside it was still smoldering. The other bottle, a half-gallon scotch bottle containing cotton floating in a clear liquid, was recovered intact from the roof of the Doll House. Fragments of the other bottle which had broken and was smoldering, were also found (Tr. 260-263). Also located at the scene of the arson was a cigar-

ette lighter.² Each of these items was preserved as evidence and tested for fingerprints.³

The government also called Gary Walton, a fingerprint expert, who testified that the fingerprints he found on evidence (from the arson site) which he inspected lacked sufficient detail to be matched with anyone's prints (Tr. 563).³

2. Appellant Raucci was the first witness for the defense. Raucci testified, in essence, that on August 7, 1976 Giattino arrived at Raucci's home in Seaford, New York at approximately 11 p.m. and that they planned to travel together to a poker game in Patchogue, New York (Tr. 701). At approximately 2:30 a.m. on August 8, they decided to leave Raucci's residence and arrived at the home of a Mr. Caputo at about 3:30 a.m., where the poker game was in progress (Tr. 704). Raucci further testified that there were no "seats" available at that time and that he and Giattino were told some seats would be open at about 6 a.m. (Tr. 706). Raucci then stated that Giattino placed a call to a Frank DeFelice and asked if he would like to join in the game (Tr. 707). Thereupon, Raucci testified, he and Giattino left Caputo's home at about 4:45 a.m. enroute to pick up DeFelice who lived

² In this regard Reiersen testified that although Giattino had cigarettes in his possession upon their arrival at the precinct, he had no means to light them and Officer Reiersen lit them for him (Tr. 288).

³ Appellants gratuitously state that no evidence relating to the crime was seized from Giattino or Raucci. "There was only an address book and a wallet found" (Br. 16, n.2.). However, appellants fail to advise this Court that the address book, which was the subject of a successful suppression motion by appellants, contained the name and number of "Island Entertainment", which was the predecessor to "Rising Star", a topless talent agency whose competitor, A&P Variety Talent Agency, was located upstairs in the Doll House (Tr. 21-22).

near the intersection of the Sunrise and Lakeland Avenue. Raucci stated that he and Giattino arrived in the area of DeFelice's home earlier than 6 a.m., which was the time they told DeFelice they would be there; accordingly they went to a "Dunkin Donuts" on the Sunrise to give Mr. DeFelice time to get ready (Tr. 710-11). At about 5:30 they left "Dunkin Donuts" and proceeded in a westerly direction on the Sunrise for approximately 800 feet, made a U-turn and began travelling easterly along the Sunrise (Tr. 713). At this point Raucci's testimony conflicts sharply with the testimony of both Officers Riersen and Colligan as to what occurred while Raucci's vehicle travelled east to Lakeland Avenue, a distance of about one and a half miles. Raucci stated that he and Giattino were travelling toward Lakeland Avenue at a speed of 45 to 50 miles per hour (Tr. 715). Raucci saw no traffic light (Tr. 748). Contrary to Officer Colligan's recollection, Raucci stated that Giattino pulled into the left hand turn lane, decelerated and made the turn at about 35 miles per hour (Tr. 722). Raucci also stated that as his vehicle was making the turn he noticed that Officer Colligan's vehicle "started to move out from the corner of Lakeland Avenue and the Sunrise" (Tr. 722). Raucci stated that he did not skid or go into a power slide when turning (Tr. 723). Raucci stated that, after making the turn, he and Giattino noticed the police vehicles behind him; Giattino pulled over, and he and Giattino got out of the car and were told to "freeze,, turn around, put your hands against the car" by Officers Reiersen and Colligan, who both had their guns drawn (Tr. 724). Raucci also testified, in response to a question posed by the Court, that he did not ask Officer Colligan what he was arrested for at the time of the arrest. That question was not asked, according to Raucci, until he was in custody in Colligan's car and en route to the Doll House (Tr. 763-

64).⁴ Raucci further stated that at the time of his arrest he was in the proximity of Mr. DeFelice's house (Tr. 716). Raucci was then transported back to the Doll House. On cross-examination he was asked whether he had ever been inside the Doll House. Raucci's response was, "In my whole life, no" (Tr. 766).⁵

Mr. DeFelice, who was then called by the defense, testified that he had received a call from Giattino at 4 or 5 a.m., was asked if he wanted to join a poker game, said yes and proceeded to get dressed and await the arrival of Giattino. However, contrary to Raucci's explanation for stopping at "Dunkin' Donuts", DeFelice stated that no time for their arrival was given (Tr. 804).

The last defense witness was Patsy Basilicato, who was a party to the card game in Patchogue. He testified to the presence of Giattino and Raucci at Caputo's home at about 3:00 a.m. on August 8, 1976, that no seats were available and that defendants were told that a seat might "open" at 6 a.m. Mr. Basilicato, however, had no recollection of any conversation with Raucci where, as Raucci testified (Tr. 738), Basilicato said he was losing quite a bit of money: "About \$85, I don't know, I really don't recall the sum". To the contrary, Basilicato, who had just met Raucci, stated, when asked if he told Raucci in

⁴ The district court found this fact of particular significance. In evaluating the credibility of the witnesses in its Memorandum and Order of August 11, 1977, the court noted: "When told he was arrested for arson, Raucci did not even inquire as to what had been burned. If his story were correct, that Reiersen had mistaken his car for the getaway car, Raucci's conduct would undoubtedly have been much different at the time of his arrest" (A. 116).

⁵ The district court also noted that it specifically recalled that in giving this response "Raucci raised his voice and nearly rose out of the witness stand, thereby dramatizing his denial of any prior contact with the Doll House" (A. 94).

terms of dollars how much he was losing: "No card players don't discuss that. You say you're doing good or you're doing bad. That's all" (Tr. 824).

3. On rebuttal the Government called Ms. Carol Fein. Appellants initially objected to her testifying on the ground that they had not been told that she could identify Raucci as a one-time patron of the Doll House (Tr. 825). Assistant United States Attorney (AUSA) Thompson replied that Carol Fein's name had been given to counsel during discovery although she had not been specifically named as an individual who could identify Raucci as a patron of the Doll House.⁶ Thompson also stated that counsel was advised on several occasions that both defendants had been identified as individuals who frequented topless bars in Nassau and Suffolk Counties and the Doll House in particular (Tr. 835). After hearing argument, the Court below ruled that counsel *had* not been entitled to Carol Fein's name or testimony and that no prejudice resulted from such non-disclosure. The Court then ruled that she would be permitted to identify Raucci as having been a patron of the Doll House (Tr. 837).

When the trial resumed, Ms. Fein testified that she recognized Raucci to be an individual who had been at the Doll House as a customer (Tr. 841). She was cross-examined by counsel with respect to her identification of Raucci and her pretrial viewing of photos of Raucci.

⁶ It should be noted that during argument on the matter, defense counsel, at various times, said "the name Carol Fein rings a bell with me" (Tr. 829) and, "as a matter of fact Carol Fein is a name that was mentioned at that time" [when the Government produced evidence] (Tr. 877). Both statements obviously indicate that AUSA Thompson was correct in his recollection that Ms. Fein's name was produced.

4. On surrebuttal defendants called Agent Jensen and examined him with respect to the photo-spread shown to Carol Fein. Jensen testified that at the time he interviewed Ms. Fein he was not looking for the perpetrators of a crime but for a motive linking defendants to the firebombing of the Doll House (Tr. 885, 889). Jensen also stated that he had gestured in the direction of Raucci while he was in the hallway with Ms. Fein before she testified, and that he was certain that he had shown at least three photos to Ms. Fein when he first interviewed her (Tr. 887). These were a full-length black and white photo of Raucci, a color "mug" shot of Raucci and a color "mug" shot of Giattino (Tr. 887). In addition, three other identical-in-form color "mug" shots of other individuals may also have been displayed to her (Tr. 887). The last witness heard by the jury was Mr. Lee Johnson, who testified that he saw Agent Jensen, while in the hall with Ms. Fein, point at the defendants (Tr. 912).

5. Following all testimony in the case, counsel moved to strike Ms. Fein's testimony on the ground that both the photo-spread and "show-up" were impermissibly suggestive. The court denied the motion, reasoning that, inasmuch as Fein's testimony related solely to the credibility of Raucci, it was proper cross-examination material to which the exclusionary rules would not apply (Tr. 917). The jury was given a limiting charge that Ms. Fein's testimony related solely to credibility (Tr. 1052).

Following the jury's rendering a guilty verdict the court requested that both parties submit motion papers on the issue of the admissibility of Ms. Fein's testimony (Tr. 1089). That done, the matter was called on July 21, 1977 and an extensive hearing was conducted. During that hearing the court heard testimony from AUSA Thompson, James Pascarella, Esq., counsel here and below for both appellants, Special Agent John Jensen, Carol Fein and Lee Johnson (See pp. 11-15, *infra*). The hearing

took eight hours and filled more than 300 pages of transcript. On August 11, 1977 defendants' application was denied in a lengthy written opinion (A. 81-117).

ARGUMENT

POINT I

Appellants Were Not Misled by the Government and Suffered No Prejudice As a Consequence of the Government's Actions.

The first claim raised on this appeal is that appellants suffered undue and unreasonable hardship because of the Government's non-disclosure of the prospective testimony of a potential rebuttal witness, Carol Fein. To have required such disclosure at a time when the Government had no idea as to whether either or both appellants would testify at trial and, if they did testify, the nature of their testimony, is to push the limits of discovery beyond those sanctioned by any court to date.

As discussed above, appellants claim to have asked on January 4 and 5, 1977, whether the Government could produce anyone to testify that defendant Raucci had ever been in the Doll House. The Government answered this question truthfully and in the negative at that time as no witness had as yet been located to so testify (A. 51). At that time the Government did, however, provide counsel with the names of individuals who were either owners or employees of the Doll House. Among the names produced to the defense counsel at that time was Carol Fein who, as of January 5, had not been interviewed by the Government (H. 52). Thereafter, during an interview on January 10, 1977, Carol Fein identified Raucci from a photo-spread as an individual who had been a patron at the Doll House in July, 1976, about a month before the crime

charged was committed. Shortly thereafter, counsel was informed by the Government that both appellants had been patrons at various topless bars in Nassau and Suffolk Counties (Tr. 835; H. 59-60). Counsel, being advised that such potential testimony existed, asserted that his clients denied ever having been patrons of such establishments (Tr. 836; H. 60); following defendant Raucci's statements at trial that he had never been in the Doll House (Tr. 766), Carol Fein was called by the government and testified that she clearly recalled having seen Raucci at the bar in the Doll House on several occasions (Tr. 841-42).

Appellants herein argue that it was improper for the government not to advise counsel after the January 10 interview with Fein, that someone could identify Raucci as having been in the Doll House at any time.⁷ The heart of their claim appears to be grounded on the theory that once the government responds to a question in discovery, there arises a continuing duty to disclose any change in that answer based on newly discovered information—regardless of how collateral the issue is to guilt or innocence. Clearly, this claim is without merit. The district court, after several hearings and argument on the matter, ruled that Carol Fein's testimony was admissible. Indeed, appellants' instant argument was fully addressed by the court below:

The only basis on which I would exclude her testimony would be if there had been some misconduct on the part of the prosecution. I don't

⁷ It should be noted that there is no suggestion of a wilful misrepresentation by the government. Indeed, defense counsel denied any such insinuation below:

The Court: You're not claiming he deliberately misled you?

Mr. Pascarella: I know Mr. Thompson and I don't think he would. But what I'm saying is I was misled. (Tr. 8)

find any here, just as you have assumed, Mr. Pascarella, you do not assume that he acted deliberately. I accepted his statement that he did not know of this witness until February, late February or early March.⁸ I do not find that he had a duty to inform you of her existence. Therefore, I find that there is no misconduct, either intentionally or constructively under the circumstances. Your position that you relied on this, on what he told you and you assumed that it was up to the time of the trial, to the extent that you are prejudiced by the reliance, it seems to imply that you're entitled to know everything the government knows about your case, which is not yet the law. (Tr. 837).

To be sure, the Government went beyond the discovery rules set forth in Rule 16 of the Federal Rules of Criminal Procedure. It produced Carol Fein's name to defense counsel. Counsel was also told an investigation of the defendants' background had been commenced to establish a motive for the fire-bombing. Counsel was also informed that both of his clients were identified as patrons of topless bars including the Doll House. Counsel understandably relied on the representations of his clients, which were to the effect that they did not frequent such establishments (and thus counsel apparently chose not to pursue, independently, the various leads provided by the government on these matters). There is simply no merit in appellants' argument that the government should have gone further than it did. Appellants' contention that the government should be required to reveal the results of its investigation to defendants lest a defendant be caught in a

⁸ It is noted that following a full hearing on these issues the Court below found that Thompson did in fact meet Ms. Fein on January 10, 1977 (A. 89).

lie is to go so far beyond the accepted rules of discovery as to be frivolous. See *Moore v. Illinois*, 408 U.S. 786, 795 (1972).

Finally, and quite importantly, even if it is assumed that counsel was not advised that someone could place Raucci in the Doll House, it must be noted that that information deals solely and totally with a collateral issue—whether Raucci had ever been in the Doll House—and has no bearing whatever on whether Raucci committed the crime charged. Accordingly, any reliance by appellants upon *United States v. Miller*, 411 F.2d 825 (2d Cir. 1969), is wholly misplaced. *Miller* dealt with the failure of the government to disclose to counsel that a key witness had been hypnotized prior to trial. Clearly such material information cannot be compared with the information which the government felt need not be disclosed in the instant prosecution. As noted by the district court:

“When they [the government] learned of Fein’s ability to place Raucci at the Doll House, they attached no particular significance to it because they did not perceive any related circumstances which would spell out the motive they were then looking for. AUSA Thompson did not intend to use Fein as a witness. Certainly, he did not intentionally conceal her existence or her potential testimony from defense counsel.

The only reason she was called as a witness was to attack the credibility of defendant Raucci who had dramatically insisted that he had never been inside the Doll House. That sudden twist in the trial provided an opening on an important point of credibility which AUSA Thompson seized upon and turned to his advantage, all well within the parameters of a fair trial and proper conduct by the prosecution.” (A. 106).

Appellants also contend that had they known of Carol Fein's testimony in advance further investigation could have been done, further discovery might have been requested and additional facts uncovered. This claim is likewise without merit. Some six weeks elapsed between the delivery of the jury's verdict on May 6, 1977 and the lengthy hearing conducted on July 21, 1977. As the district court noted, no information damaging to her credibility had been uncovered in that period (A. 108).

In essence, appellants' claim in this regard boils down to the fact that, had they known that Ms. Fein could identify Raucci as a former patron of the Doll House, Raucci would have known better than to lie about the matter during cross-examination.

It is respectfully submitted that appellants' claim that they were misled by the government and thereby suffered undue and unreasonable prejudice is simply not supported by the facts.

POINT II

Under The Totality Of The Circumstances It was Proper To Admit Carol Fein's Identification Testimony.

Appellants argue at length that the "impermissibly suggestive" photo-spread shown to Carol Fein and the so-called "show-up" in the corridor before Ms. Fein testified caused an irreparable misidentification of defendant Raucci and, consequently, rendered it improper to admit her testimony.

A. The Photo-Spread

With respect to the photo-spread, appellants' contention is baseless for several reasons:

1. The Photo-Spread was not Suggestive.

On January 10, 1977, Agent Jensen displayed to Carol Fein, according to his own testimony, a photo-spread of at least two and possibly six photos (Tr. 885). Five "mug" shots were identical in form and of five different individuals.⁹ The instant claim is that the photo-spread was suggestive since only three photos were shown—one color "mug" shot of Raucci, one full length black and white photo of Raucci and one color "mug" shot of Giattino. Perhaps such a photo-spread would have been suggestive. However, while Agent Jensen was not certain at the time he testified as to the number of photos shown to Carol Fein, AUSA Thompson, who was present with Jensen on January 10, stated that a photo-spread was laid out which consisted of at least five mug shots, identical in form, of different individuals (Tr. 1069; H. 274-76).

Appellants further argue that notwithstanding the number of photos shown, the appearance of the individuals in the photo-spread was impermissibly suggestive. As appellants frame the question in their brief—"Should not any of the photographs have any of Raucci's characteristics, other than the fact they were all Caucasians" (Br. at 31). However that issue was clearly a factual issue for the trial court's resolution and the district court, after full hearings on the matter both during and after trial, held that there was nothing suggestive in the procedures used by the government:

The photographs in question are basically similar, all being color mug shots taken of individuals who are not significantly different from each other.

⁹ Three of those photos were marked in evidence by the Court as Defendants' Exhibits R, Y and V. The other three were marked as Defendants' Exhibits U, W and X for identification.

All were white with dark hair except Giattino, who is balding. Obviously, there were individual differences, but nothing in particular that would suggest to Fein that for some reason or other she should identify Raucci as a past customer of the Doll House. (A. 109-110).

It is respectfully submitted that the individuals in the photo-spread are sufficiently similar to render the spread completely proper.

2. Agent Jensen was not Required to use a Photo-spread in the First Instance.

Notwithstanding the above discussion of the propriety of the photo-spread, it is also respectfully submitted that this is not an issue at all since, under the circumstances, there was no burden on Agent Jensen to utilize a photo-spread. The testimony elicited at trial indicates quite clearly that on January 10, 1977 Agent Jensen was speaking to Carol Fein to see if he could find anyone who could identify the appellants as having frequented the Doll House (Tr. 889). Agent Jensen was clearly not attempting to elicit any eyewitness identification of the perpetrator of the crime but was doing a background investigation of the defendants in an attempt to establish some type of motive (Tr. 889). Under those circumstances it would have been perfectly proper police procedure to present one photograph of Raucci or one photograph of Giattino to see whether anyone recognized them.

Defense counsel's position might be tenable if the photo-spread was in fact suggestive and if we were dealing with an identification bearing upon the guilt or innocence of the person identified. That clearly is not the case here. Indeed the district court held:

"We must first consider whether or not the rules barring identification under suggestive circumstances apply here. When Fein first recognized Raucci's photograph, the government was engaged in a general investigation covering topless bars and booking agencies for topless dancers, and was trying to discern a connection between those activities and the five individuals they suspected were somehow involved. Fein was not the victim of a crime who was asked to identify her assailant; she was merely asked if she recognized any of the five men as customers at the Doll House. She did not know why she was being asked the question. Consequently, nothing in the circumstances would call for invocation of the rule barring suggestive procedures in connection with a photo-spread." (A. 109).

If, as appears to be the case, appellants are arguing that the photo-spread was impermissibly suggestive in that it implanted the idea in Ms. Fein's mind that Raucci had been a patron at her bar, the claim should be dismissed summarily. That issue was so tangential as to be meaningless. It was only after "defendant Raucci had drastically insisted that he had never been inside the Doll House" (A. 106; Tr. 766) that Ms. Fein's identification had any significance and its significance was solely as rebuttal testimony on the issue of credibility. Under the circumstances there was no requirement to use a photo-spread and, *a fortiori*, no need to present a non-suggestive photo-spread.

3. Under the Totality of the Circumstances there did not Exist a "Very Substantial Likelihood of Irreparable Misidentification."

In arguing the impropriety of the admission of Ms. Fein's testimony, the appellants rely heavily upon

Manson v. Brathwaite, 432 U.S. 98 (1977). *Manson* reversed this Court's holding in *Brathwaite v. Manson*, 527 F.2d 363 (2d Cir. 1975), which excluded evidence as to a photograph shown to a government witness, regardless of reliability, because the examination of the photograph was unnecessary and suggestive. *Brathwaite* now stands for the proposition that the totality of the circumstances should guide the court in ruling on the admissibility of identification testimony. As we have argued, Agent Jensen could properly have shown a single photo of Ms. Fein, whose identification testimony was purely collateral. In any event, it is submitted that *Brathwaite*, rather than supporting appellants' position, illustrates the propriety of admitting Ms. Fein's testimony, including her in-court identification of Raucci.

The factors set forth in *Brathwaite*, which relied upon *Neil v. Biggers*, 409 U.S. 188 (1972), prompted the Supreme Court to rule as admissible the identification of a defendant as the individual who committed the crime, notwithstanding the fact that the witness was shown only one photo. The admissibility was apparently grounded upon the reliability of the witness' identification. Some of the criteria used in *Biggers* to determine reliability are helpful in determining whether here, under the totality of the circumstances, Carol Fein's identification was reliable.

(a) The opportunity to view.

Carol Fein testified that on two different occasions the defendant Raucci was sitting on a bar stool directly across from her at a distance of not more than the width of a bar top (Tr. 842). She was serving him as he sat at the bar and had ample opportunity to view him. Clearly more than sufficient opportunity to view Raucci existed.

(b) The degree of attention.

Carol Fein stated that she noticed defendant Raucci not for any casual reason but because of a sarcastic remark he had made (Tr. 843). In addition, Ms. Fein was not in any stressful situation such as that experienced by a victim of a crime, where the pressures of the moment could conceivably distract one from a clear eyewitness observance of a perpetrator. Rather, Ms. Fein had ample opportunity to view Raucci in her normal working situation with the added circumstances of Raucci's remarks adding to the certainty of her testimony. Ms. Fein was the more certain of her identification because of the way Raucci cocked his head both in the bar and while sitting in the courtroom (Tr. 849). Based on its own observations of appellant Raucci, the district court found that Ms. Fein's description of Raucci's "sarcastic attitude and his manner of cocking his head were both observed by the Court while Raucci testified at trial." (A. 113-14).

(c) The witness' level of certainty

When she testified in court, Ms. Fein had no question in her mind whatever that Raucci had indeed been a patron at the Doll House. She recalled him distinctly, recalled that he had made a sarcastic remark which offended her, recalled the way he was dressed, the approximate time of the evening he was at the bar and the way he cocked his head. Clearly, as the court below noted: "[t]here can be no doubt of Fein's level of certainty" (A. 111).

Under the totality of these circumstances, the test set forth most recently in *Brathwaite*, it was perfectly proper to admit her testimony.

B. The "Show-Up"

With respect to the "show-up" in the corridor outside the courtroom, the court made extensive post-trial findings of fact as to the occurrences in the hallway when the so-called "show-up" occurred; these findings included references to the court's own trial notes and to the physical dimensions of the corridor outside the courtroom (A. 95-104). After outlining its findings, the court held:

"Under all of the circumstances I . . . conclude that Fein's viewing of Raucci in the hall immediately prior to her testifying was accidental, unintended and unplanned by the government, and had no effect upon her testimony. Her identification of Raucci was certain and positive; indeed she had independently recognized him as she first went to the United States Attorney's Office at a time when Jensen was not even aware Raucci was present in the hallway." (A. 104).

Ms. Fein was certainly an independent witness with no motive to lie. She did not know appellant Raucci, Agent Jensen or AUSA Thompson prior to January 10, 1977. The court below found her to be "believable, sincere, precise and accurate both in her observations and in her language. She appeared resistant to suggestion both by government counsel and defense counsel" (A. 113). This impression was based on her appearance in court and her testimony on two separate occasions. On the other hand, the testimony of Lee Johnson—upon whom appellants rely to establish the claimed "show-up" and to whom appellants' counsel refers as "perhaps the only independent, disinterested witness in all the proceedings"—was found by the court below to be "incredible" (A. 103). Any suggestion that the meeting was arranged is baseless. In a situation such as this

where "there was no showing that the Government arranged the meeting or that the in-court identification was the result of an impermissibly suggestive confrontation, the identification testimony was properly admitted." *United States v. DiStefano*, 555 F.2d 1094 (2d Cir. 1977). See also *United States v. Gentile*, 530 F.2d 461, 468 (2d Cir.), *cert. denied*, 426 U.S. 936 (1976).

Furthermore, even assuming that the "show-up" did occur intentionally, a conclusion sharply contradicted by the evidence, under *Brathwaite* Ms. Fein's testimony would still be admissible. As discussed in Point IV, *infra*, the "linchpin" in determining the admissibility of Ms. Fein's testimony is reliability. As stated by the district court: "... the evidence is overwhelming that her testimony was reliable" (A. 111).

Accordingly, it is respectfully submitted that the occurrence in the corridor outside the Courtroom had no bearing whatever on the witness' reliability and her in-court identification was properly admitted.

POINT III

The Government did not deny Appellants access to exculpatory material.

Appellants next argue that it was improper for the Government to deny them "access to exculpatory material". The "exculpatory material" which appellants claim was withheld was the prosecutor's alleged "feeling that Fein's identification was uncertain" (Br. 38). Specifically, appellants suggest that the prosecutor, concerned about the lack of conviction in Fein's "identification", omitted evidence that Fein had been unable to identify Raucci in a 7-year-old mug shot, one of the pictures of Raucci contained in the photo-spread. Ap-

pellants curiously charge that the government's failure to divulge that information runs afoul of the mandates of *Brady v. State of Maryland*, 373 U.S. 83 (1963) and *United States v. Agurs*, 427 U.S. 97 (1976). Appellants' argument appears to ignore the facts, disregard the law and generally boggle the mind. Ms. Fein had no idea that a crime had been committed when she initially identified Raucci from the photo-spread. Her identification consisted of a simple statement that Raucci had been a customer in the Doll House. She in no way inculpated Raucci in a crime and consequently her inability to recognize an old photo of Raucci cannot be deemed exculpatory under *Agurs*, *supra*, which held:

"The proper standard for materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial." 427 U.S. at 112-113.

The district court applying the reasoning of *Agurs* to the facts here stated:

... the omitted evidence is merely the failure to recognize Raucci in the seven-year-old picture. Had that evidence been added it would not have generated a reasonable doubt as to the guilt of the defendants. Indeed, the evidence did not bear directly upon guilt or innocence at all, but merely affected what the government has insisted throughout was a collateral issue, namely the credibility

of Fein who contradicted Raucci on a minor point which was brought out in his cross-examination. (A. 115).

It is respectfully submitted that the government's failure to disclose Ms. Fein's inability to recognize Raucci in one photo was not "material" in the constitutional sense and did not deprive appellants of due process of law. On the contrary this is precisely the type of evidence which the Supreme Court had in mind when it stated in *Agurs, supra*:

The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial does not establish "materiality" in the constitutional sense. 427 U.S. at 110.

The non-disclosure of such collateral testimony is obviously insufficient to warrant a new trial.

POINT IV

The testimony which appellants claim warrants a new trial fails to satisfy the requirements of newly discovered evidence.

Appellants advance their claims for a new trial upon two theories. Initially, they claim that certain testimony which formed the basis of a post-sentencing motion below and which is set forth in their appendix constitutes "newly discovered evidence" (A. 121-136).¹⁰ Briefly, appellants claim that following their sentencing on September 1, 1977, their attorney left the courthouse with a group

¹⁰ Rather than duplicating all the facts contained in the appellants' appendix, the court respectfully referred to them.

of their relatives including a Doris Massari, Raucci's sister-in-law. She told counsel, it is claimed, that she had been present in court on May 5, 1977, the day Carol Fein testified at trial, and had observed the alleged "show-up" during the luncheon recess—between 1:15 p.m. and 2:50 p.m., according to the court's findings (A. 94)—rather than during the unexpected recess at 3:42 p.m., as the court had held (A. 101). This, appellants argue, is "newly discovered evidence" requiring a new trial.¹¹

At the outset it should be noted that such applications "are viewed with disfavor" and "are addressed to the sound discretion of the trial Court, whose determination thereof will not be reversed except where it is shown that there has been an abuse of discretion". *Anderson v. United States*, 369 F.2d 11, 19 (8th Cir. 1966). See also *Connelly v. United States*, 271 F.2d 333 (8th Cir. 1959); *United States v. On Lee*, 201 F.2d 722 (2d Cir. 1953). In exercising this discretion, this Court has held:

It is generally said that five requirements should be met before a new trial will be awarded on the grounds of newly discovered evidence. See the statement of *Johnson v. United States*, 8 Cir., 32 F.2d 127, 130, quoted in *Brandon v. United States*, 9 Cir., 190 F.2d 175, 178: "*** (a) The evidence must be in fact newly discovered, i.e., discovered since the trial; (b) facts must be alleged from which the court may infer diligence on the part of the movant; (c) the evidence relied on, must not be merely cumulative or impeaching; (d) it must be material to the issues involved; and (e) it must be such, and of such nature, as that, on

¹¹ It should be noted that appellants post-sentencing motion below was denied "for the reasons articulated by the government in its opposing papers" (A. 137). Those reasons are the substance of the government's argument on this point.

a new trial, the newly discovered evidence would probably produce acquittal." *United States v. On Lee, supra* at 723, n.3.

It is respectfully submitted that appellants have not simply failed to meet any one requirement, which would clearly be fatal on this appeal, but have failed to establish at least four of the five requisites.

First, contrary to the required showing of the moving party's diligence, the appellants' affidavit below (A. 122) quite clearly shows that counsel was, at best, grossly negligent. In his own sworn statement counsel indicated that he recalled the presence of Doris Massari in the courtroom on May 5, 1977. He had apparently debriefed certain of Raucci's relatives and had prepared them to testify at the July 21, 1977 hearing. Clearly Mrs. Massari should have been among them. If she was, then the testimony is not newly discovered. If she was not, counsel clearly failed to meet the diligence standard.

Second, the unambiguous facts of this proceeding indicate that the sole purpose of the "newly discovered evidence" is to impeach Carol Fein, whose testimony in no way related to Raucci's guilt or innocence as to the crime charged. Under the legal standards established in *Johnson v. United States*, 32 F.2d 127 (8th Cir. 1929), as adopted by the Second Circuit in *On Lee, supra*, the relief sought must be denied.

Third, the evidence offered is wholly immaterial. The issue raised relates only in collateral fashion to testimony which was entirely collateral. The "newly discovered evidence" is so far from the issue of guilt or innocence as to clearly indicate that appellants' claim is frivolous and must be dismissed out of hand.

Fourth, the evidence sought is of no nature as to warrant the belief that its admission would probably

result in an acquittal. Indeed, the district court so found when it held that "even if the jury concluded that Fein's identification of Raucci was erroneous, that conclusion would not detract from officer Reirson's credibility . . ." (A. 108). Under these circumstances it is in no way "probable" that a new trial would result in an acquittal.

It should also be stated that even if the testimony offered could qualify as "newly discovered evidence" within the legal definition set forth above, no new trial should be granted as the testimony is wholly irrelevant under the ruling of the court below, which held:

Finally, in this connection, under *Manson v. Brathwaite*, assuming the identification procedures were impermissibly suggestive, the key question—"the linchpin"—in determining whether or not Fein's identification testimony should have been admitted is reliability. On that point the evidence is overwhelming that her testimony was reliable. (A. 110-111)

Accordingly, it is clearly irrelevant whether Mrs. Massari did, in fact, view an impermissible show-up, (a fact the Government certainly does not concede,) since the Court has held Carol Fein's testimony admissible under *Brathwaite's* "reliability" standard, *even if there had been a show-up* before Ms. Fein.

Furthermore, it is submitted that the claim of appellants that a new trial should be granted "in the interest of justice" due to the sum of errors committed, is as meritless as the numerous claims which appellants suggest constitute the whole.

CONCLUSION

The judgment of conviction should be denied.

Dated: Brooklyn, New York
March 24, 1978

Respectfully submitted,

DAVID G. TRAGER,
*United States Attorney,
Eastern District of New York.*

HARVEY M. STONE,
RONALD G. RUSSO,
*Assisiant United States Attorneys,
(Of Counsel).*

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Ella Hill

being duly sworn,
deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 27th day of March 19 78 he served a copy of the within
Brief for the Plaintiff-Appellee

by placing the same in a properly postpaid franked envelope addressed to:
James A. Pascarella, Esq., One Old Country Road, Carle Place, N.Y. 11514

and deponent further says that he sealed the said envelope and placed the same in the mail chute
drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Brooklyn Borough~~, Borough of Brooklyn, County
of Kings, City of New York.

Ella Hill

Sworn to before me this

27th day of March 19 78

Barbara Allen

BARBARA A. ALLEN
Notary Public, State of New York
No. 24-4646824
Qualified in Kings County
Commission Expires March 30, 1979

1514